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CASE NOS.: **2005-LHC-02355**
2005-LHC-02356
2005-LHC-02357

OWCP NOS.: **01-161428**
01-119372
01-154833

In the Matter of

B. S.[1]

Claimant

v.

BATH IRON WORKS CORPORATION

Employer/Self-Insured

APPEARANCES:

Marcia Cleveland, Esq., Marcia Cleveland, LLC, Bath, Maine, for the Claimant

Stephen Hessert, Esq., Norman, Hanson & DeTroy LLC, Portland, Maine, for the Employer

BEFORE: COLLEEN A. GERAGHTY
Administrative Law Judge

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for workers' compensation and medical benefits filed by B.S., the Claimant ("Claimant"), against Bath Iron Works Corporation ("BIW" or "Employer"), under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* (the "Act").[2] After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in Portland, Maine on June 27, 2006, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer.[3] The Hearing Transcript is referred to herein as ("TR"). The parties offered stipulations, and testimony was heard from the Claimant. At hearing, documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-23[4] and Employer's Exhibits ("EX") 1-55.[5] TR 11-12, 22, 27. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-13. TR 13-15. Thereafter, the parties filed briefs.[6] The record is now closed.

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[2] The Claimant seeks compensation for numerous individual days he alleges he missed work as a result of the injuries associated with the three claims which are the subject of this matter.

[3] The Department of Labor's Office of Workers' Compensation Programs (OWCP) declined to participate in the matter and did not appear at the hearing in spite of being served the Notice of Hearing and Pre-Hearing Order issued August 11, 2005, the Order Rescheduling Hearing and Pre-Hearing Order issued on January 19, 2006, and the Notice of Status Conference and Hearing Assignments issued on April 13, 2006. Nor did OWCP file a post-hearing brief, after it was served with the Briefing Order issued on June 28, 2006.

[4] By letter dated June 29, 2006, the Claimant filed an Amended CX 20 representing the dates for which he is claiming benefits. The Amended CX 20 has been admitted.

[5] The Employer submitted 55 exhibits which were admitted at the hearing. TR 11-12. A post hearing telephone conference was held with the parties on July 14, 2006 to provide the Claimant an opportunity to respond to two documents the Employer identified at hearing but sought to admit post-hearing, an opinion of the Maine State Board of Licensure suspending the license of Dr. Vigna, one of the Claimant's treating physicians, and a notice of suspension for Dr. Vigna from the Maine Board of Medical Licensure's webpage. The Claimant notified the Court by letter dated July 21, 2006, that she intended to depose Dr. Austin, the Claimant's primary care physician, in response to the two documents the Employer sought to admit. On November 1, 2006, the Employer submitted as an exhibit the deposition of Dr. Austin which the Claimant initiated. Dr. Austin's deposition is therefore marked EX 56 and admitted. As noted at the hearing the Employer stated it had an additional exhibit, a decision with regard to Dr. Vigna, one of the Claimant's physicians, it wanted to submit post-hearing. TR 24-25, 80. By letter dated July 6, 2006, the Employer submitted two additional exhibits. The first exhibit, incorrectly marked by the Employer as EX 48, is the opinion of the Maine State Board of Licensure with regard to Dr. Vigna. The second exhibit, incorrectly marked by the Employer as EX 49, is a May 11, 2006 notice of suspension for Dr. Vigna from the Maine Board of Medical Licensure's webpage. The two post-hearing exhibits have been renumbered and marked as EX 57 (opinion) and EX 58 (notice of suspension), respectively, and are hereby admitted, as the Claimant was given the opportunity to respond to the two exhibits post-hearing.

[6] A telephone conference was held with the parties on November 16, 2005. Upon consideration of the parties' contentions, the Employer was permitted to file a reply brief in this matter because the parties were directed to file briefs simultaneously and the Employer timely filed its brief, however, the Claimant did not file his brief by the

After careful analysis of the evidence contained in the record, the parties' stipulations and their closing arguments, I have concluded that the Claimant's chronic neck pain and occasional headaches were the result of his 1991 work injury and that the 2001 work-injury aggravated his condition. The Claimant is therefore entitled to compensation benefits for individual days he missed from work as a result of headache for the period 2003 through April 5, 2006.

My findings of fact and conclusions of law are set forth below.

II. The Claims, Parties Stipulations and Issues Presented

There are three claims alleging three dates of injury. The claims are for permanent partial disability compensation benefits for various days missed from work allegedly as a result of the injuries.[7] At the hearing, the parties provided stipulations for each date of injury. For the March 11, 1991 date of injury, the parties stipulated to the following: (1) the Claimant injured his neck on March 11, 1991; (2) the March 11, 1991 neck injury arose in and out of employment at the shipyard; (3) the Longshore Act applies to the March 11, 1991 neck injury; (4) there was an employer/employee relationship on March 11, 1991; (5) the claim for injury based upon the neck injury of March 11, 1991 was timely filed and controverted. TR 5-6, 8.

For the December 3, 2001 date of injury, the parties stipulated: (1) the Longshore Act applies; (2) an employer/employee relationship existed on December 3, 2001; (3) the claim for

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established due date. As a result, the Employer's brief was filed more than a week before the Claimant's brief and BIW was given an opportunity to file a short reply.

[7] The Claimant initially sought compensation for individual days he missed work in 2005. ALJ EX 7. When the matter was first called for hearing on December 20, 2005, the Claimant's claim was for compensation for days missed from work in 2005. ALJ EX 14. The matter was continued when the Claimant, at the opening, stated he was expanding his claim to include days missed from work in 2003, 2004 and 2005. *Id*. at 7. The Employer objected arguing that was the first time he learned the claim was to include missed days for 2003 and 2004. *Id*. at 8-14. The hearing was continued to permit the Employer to prepare to defend the dates sought in 2003 and 2004 and to permit the parties to take the deposition of Dr. Pier. *Id*. at 15-16. At the re-scheduled hearing on June 27, 2006, the Claimant stated that based upon a revised Pre-Hearing Statement filed May 2, 2006, he was now claiming compensation for various days going back fifteen years to 1991. ALJ EX 11. The Employer objected that the case had been continued once as the Claimant sought to add dates from 2003 and 2004, and now the Claimant sought to add dates going back to 1994. TR 20-21, 23-24. The Claimant has repeatedly attempted to expand the claim, either at the hearing or by amending a Pre-hearing statement shortly before the hearing. First, seeking compensation for missed days in 2005, then at the initial hearing expanding the claim to include days in 2003 and 2004, and then six weeks before the re-scheduled hearing attempting to expand the claim again to include dates going back twelve years to 1994. In my view, the Claimant's actions in this regard are akin to "moving the goal posts once the game has begun" if you will. TR 27-28. Having re-scheduled the hearing once to permit the Claimant to expand the claim to cover days allegedly missed from work in 2003 and 2004, and afford the Employer the opportunity to defend the claim, I find that the claim properly before me is for days in 2003, 2004, 2005 through April 5, 2006. The Claimant continued to miss days from work into 2006 and at the hearing presented evidence that the last day he missed was April 5, 2006. CX 20 Amended. If the Claimant wishes to pursue a claim for dates prior to 2003, he can file a separate claim explicitly seeking compensation for specific days missed prior to 2003.

injury on December 3, 2001 was timely noticed and controverted; (4) the average weekly wage for this date of injury is $764.96. TR 6-7, 8; JX 1.[8]

With regard to the January 20, 2005 date of injury alleging injury to the back and neck, the parties stipulated: (1) the back component or aspect of the injury resolved and is not being pursued; (2) an employer/employee relationship existed on January 20, 2005; (3) the claim for injury on January 20, 2005 was timely noticed and controverted. TR 7-9.

In addition, for all of the days that the Claimant asserts he lost time and is entitled to compensation, the parties stipulate that there was work available at BIW for the Claimant within the work restrictions assigned by his treating physicians. TR 79.

The issues in dispute are: (1) whether the Employer is precluded under collateral estoppel principles from asserting that the Claimant's current condition is not related to the March 11, 1991 injury based upon a Consent Decree from the Maine Workers Compensation Board; (2) whether the Claimant's current neck pain and headaches are caused by any of the three alleged work injuries; (3) the nature of the impairment; (4) the reasonableness and necessity of medical care; (5) whether the Employer is entitled to relief from liability from the Special Fund pursuant to Section 8(f) of the Act.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant began work at BIW on April 3, 1989 in the temporary ventilation department. TR 30. He worked there for approximately five years and then was laid off during the summer. He was called back to the paint department, where he has remained.

The Claimant injured his neck on March 11, 1991, when he was pulling ventilation tubing and struck his head on a bar. TR 34-35. He was knocked down and his glasses and hard hat fell off. *Id*. The Claimant stated he completed his shift that day but developed a stiff neck that evening and wasn't able to turn his neck. TR 35-36. The next day he reported to the BIW First Aid Department for treatment. TR 36.

In the first year or two following this injury, the Claimant stated that his neck "was a discomfort aside from a stiffness. It was primarily on the left, but it also bound up when I tried to turn right too much. A lot of the stiffness went away, but some of it continues. I would describe it as, at least, uncomfortable. And it was a number of weeks afterward that I just began to get head pain and headaches that I had never had before." TR 36. The Claimant stated that he

[8] Following the hearing, a telephone conference call was held with the parties on April 25, 2007, at which the parties were asked to attempt to reach a stipulation on the amount of the average weekly wage for the December 2001 injury date and, failing that, to submit evidence upon which such a determination could be made. By letters dated April 30, 2007 (the Employer) and May 1, 2007 (the Claimant), the parties indicated that the stipulated average weekly wage for the December 3, 2001 injury date is $764.97. I have combined the two letters and hereby mark the letters as Joint Exhibit 1, and admit the exhibit.

did not lose any time from work immediately after this injury. TR 35-36. Following his injury in 1991, the Employer sent the Claimant for physical therapy to Saco Bay Physical Therapy. The Claimant reported that the therapy helped relieve neck discomfort and his really stiff neck went away. TR 38. The Claimant reported that from the time of the injury up until the date of the second injury at issue herein, that is, December 3, 2001, his symptoms remained the same except that at times his neck would be more uncomfortable or stiff depending upon his activities. TR 37-38. He reported that during this ten year period he was experiencing headaches once a month. TR 37. The Claimant testified that he occasionally lost time from work because of neck pain and headaches between 1991 and 2001. *Id*. The Claimant was able to continue working his regular duties following the March 1991 injury.

The Claimant alleges he suffered an injury on December 3, 2001. TR 32. He had been assigned to a detail to clean up trash on the C Ways, an area where the ships are constructed and placed into the water. *Id.* As he walked out from underneath the C Ways area, the Claimant misjudged his location, stood up too soon, and struck his head on the cement ceiling. TR 32, 38. The Claimant sought treatment from his chiropractor, Dr. Thomas Chasse. TR 32. The Claimant stated that his stiff-neck returned but dissipated in four or five days, although he reported that the level of constant discomfort had increased. TR 38. On cross-examination, the Claimant acknowledged that he told Drs. Kolkin and Pier, independent medical examiners, that the 2001 injury caused a temporary flare-up in his neck condition, but that he then returned to baseline. TR 50.

With regard to the injury of January 20, 2005, the Claimant said that it was snowing as he went outside the building, he slipped and lost his footing, and his back hit the stairs. TR 31. The Claimant went to the emergency room and x-rays were taken of his low back area. TR 46. The x-rays were negative. *Id*. The Claimant stated that the next day his back symptoms worsened and he went back to BIW First Aid after the lunch period, was not able to see the doctor, so he went to see his own physician, David Austin, M.D., later that day. *Id*. Dr. Austin kept the Claimant out of work for two or three days and gave him Percocet for pain. TR 48.

The Claimant testified that during the time he was recovering from the back injury his headaches became more frequent and his neck pain more pronounced on a constant basis. TR 38-39. The Claimant acknowledged on cross-examination that when he saw Dr. Austin he was not complaining that his slip and fall injury impacted his neck. TR. 48. The Claimant reports that since the 2005 injury he experiences severe headaches which now require him to take a day a week off. TR 39. He takes Tylenol with codeine which he stated does nothing to alleviate his headache. TR 41.

On cross examination, the Claimant stated that he has had work restrictions since approximately 2002 which include minimal overhead work and no work in confined spaces. TR 69-70, 78. The Claimant agreed that BIW accommodates these two work restrictions. TR 71-72. The Claimant stated however, that he has used personal business days and/or vacation days to cover work absences caused by headaches. TR 77.

The Claimant acknowledged that BIW informed him in 2005 that it would not pay him workers' compensation benefits for time lost for headaches. TR 58-59. He stated that BIW told

him it would not accept days off for headache as a worker's compensation or work injury absence and that, if he did not want to get in trouble for being off for headache, he needed to apply for Family and Medical Leave Act (FMLA) leave approval. TR 59-60. The Claimant stated that he did apply for FMLA on occasion after May 2005 when he experienced headaches. TR 60. The Claimant also acknowledged that days that appear on the absentee record as vacation days are days that he was paid for. TR 61. He conceded that the days he did not work and which are listed as vacation days are dates that he did not provide a medical note to BIW indicating he was out of work for medical reasons. TR 61. The Claimant agreed that under the union contract he was entitled to a number of personal business days which were days he could call in and state he was taking off as personal business. TR 61-62. Personal business days are unpaid. *Id*. The Claimant also acknowledged that he would not have turned in a medical excuse on the days he took off as personal days. TR 62.

B. Medical Evidence

1. Leigh Baker, D.O.

Dr. Baker first saw the Claimant on September 19, 1991, following his first injury of March 11, 1991. At that point, the Claimant was complaining of neck stiffness and pain and severe headache originating in the left occipital region and left upper cervical region, radiating over the posterior aspect of his head. CX 5 at 34. Dr. Baker assessed the Claimant with cervical somatic dysfunction. Dr. Baker saw the Claimant several times over the period 1991 to 1996 and treated him with osteopathic manipulative therapy and several analgesic medications. CX 5 at 34-48, 80. Over the course of Dr. Baker's treatment of the Claimant there were periods when his headache and neck pain would increase in frequency and severity and then return to baseline. CX 5 at 34-48, 80. During this same period Dr. Baker wrote several notes excusing the Claimant from work on days he reported he had severe headache. CX 5 at 42-79.

2. David Austin, M.D.

David Austin, M.D., is the Claimant's primary care physician and he is board certified in family practice. TR 43; EX 56 at 10. He testified by deposition that he first saw the Claimant on April 11, 1995, for a routine physical examination. EX 56 at 3. Dr. Austin testified that he has treated the Claimant since that time and that on several occasions the Claimant has complained of headaches related to neck pain. EX 56 at 4. Dr. Austin's records reflect that he saw the Claimant on October 16, 1996 for neck pain and headaches resulting from a work injury on March 11, 1991. CX 9 at 235. His note indicates the Claimant had been receiving osteopathic manipulation from Dr. Baker, once a month to maintain a relative pain-free status, but that his insurance has not been covering the manipulations. *Id*. Dr. Austin observed tenderness to palpitation around the neck muscles and some limitation in motion. *Id*. Dr. Austin diagnosed chronic neck pain, secondary to the work injury of 1991. *Id*. He noted the Claimant has been treated for headaches due to his chronic neck condition and that he takes Tylenol with codeine as needed for his headaches. At deposition Dr. Austin stated that this is the first time he prescribed Tylenol with codeine for the Claimant's headaches. EX 56 at 5. He reported that the Claimant had been treated for his chronic neck pain and headaches for several years before he saw the Claimant and the Tylenol with codeine had been an effective treatment so he simply continued it.

EX 56 at 5. Dr. Austin reviewed the Claimant's medications and referred him for chiropractic treatment. CX 9 at 235. Dr. Austin saw the Claimant again on November 5, 1996, and reports neck pain is significantly improved after seeing Dr. Chasse, a chiropractor. CX 9 at 236.

The Claimant saw Dr. Austin next on February 9, 1998, and was still complaining of intermittent headaches related to the 1991 work injury. CX 9 at 238. At that time, the Claimant reported he was receiving some relief from acupressure and chiropractic treatments. He was also taking Tylenol with codeine. *Id*. Throughout his notes, Dr. Austin indicates the Claimant has chronic neck pain and migraine headache as a result of his 1991 work injury. CX 9 at 238-242. Dr. Austin did not assign any work restrictions, but he recommended additional treatment for the neck pain and headaches resulting from the 1991 injury. CX 9 at 239. The records indicate that Dr. Austin continued to prescribe Tylenol with codeine for the Claimant's headaches. CX 9 at 236, 238, 240. The next record from Dr. Austin indicates that the Claimant called on July 23, 2001 to refill the prescription for Tylenol 3.

At his next visit on March 25, 2002, the Claimant reported that he struck his head at work on December 3, 2001, causing a flare-up of his chronic neck pain. CX 9 at 242. To address the flare-up he has increased his chiropractic visits to twice per week and his pain is improving. The progress note states the Claimant continues to have chronic neck pain and associated intermittent headaches as a result of the 1991 work injury with a flare-up of symptoms secondary to recent December 2001 injury. *Id*. Dr. Austin attempted to try abortive medication for migraine and he also continued the Tylenol with codeine. *Id*. At his deposition, Dr. Austin said that he had not attempted to switch the Claimant to medications other than the Tylenol with codeine as the Claimant had used that medication effectively for several years. EX 56 at 5.

On the November 19, 2002 visit, the Claimant continued to report neck pain and an increase in frequency of migraine headaches from one or two per month to one or two per week requiring the use of Tylenol with codeine. CX 9 at 244. After some discussion, Dr. Austin prescribed a trial of Ultram as a substitute for Tylenol. *Id.* Dr. Austin also precluded work in confined spaces as this exacerbated the Claimant's neck pain. CX 9 at 243.

The Claimant next saw Dr. Austin two years later on February 3, 2004. CX 9 at 245. Dr. Austin continued to prescribe Tylenol with codeine for headaches over this period. CX 9 at 245.

On January 20, 2005, the Claimant consulted Dr. Austin after slipping at work and landing on the sacral region of his back. CX 9 at 247. Dr. Austin diagnosed a contusion to the sacral region and chronic neck pain with a new development of radiculopathy which the Claimant reported over the last month. CX 9 at 247. Dr. Austin excused the Claimant from work for a few days and prescribed Percocet to control lower back pain. *Id.* Dr. Austin testified that he did not think the back injury had any effect on the level of symptoms with the Claimant's neck because the Claimant gave him a history of symptoms that may have been related to the Claimant's neck that had occurred over the months prior to the back injury. EX 56 at 8.

Dr. Austin stated that he completed a Family and Medical Leave Act (FMLA) form at the Claimant's request on October 18, 2005, indicating the Claimant is unable to work once or twice a month. EX 56 at 13-17. Dr. Austin testified that being unable to work once or twice a month

seemed a reasonable amount of time given the nature of the Claimant's problem and the treatment he had been giving the Claimant for a number of years. EX 56 at 17. Dr. Austin cautioned however, that if the Claimant needed significantly more time off from work that would not be reasonable and he would not have completed the FMLA form. *Id*.

3. Thomas Chasse

The Claimant has seen Thomas Chasse, a chiropractor, for several years beginning in 1996 to the present for treatment of neck pain accompanied at times by headache. CX 8; EX 34. Dr. Chasse's progress notes indicated he treated the Claimant with chiropractic manipulation therapy. CX 8 at 200-232; EX 34 at 100-222. Dr. Chasse diagnosed chronic neck and upper back problems on November 13, 1996, but the records submitted did not specify the precise diagnosis. EX 34 at 180. Dr. Chasse later stated the diagnosis was acute sublaxation syndrome at the level of the 5th cervical vertebra with strain/sprain of the cervical spine and suboccipital headaches. EX 34 at 146. Dr. Chasse completed several authorizations for work absences for the Claimant over this period of time. CX 8; EX 34.

Dr. Chasse's treatment records demonstrate that at points over the period of his treatment of the Claimant, the Claimant was seen on an appointment basis established by Dr. Chasse, and at other times the Claimant was relatively symptom free, and was seen if the Claimant experienced an exacerbation of symptoms. EX 34 at 100-222. For example, from March 2000 through November 2001, the Claimant treated with Dr. Chasse on average once per month. CX 8 at 136-146.

Following the December 3, 2001 incident where he hit his head coming out of the C Ways area, the Claimant saw Dr. Chasse two days later on December 5, 2001. The Claimant told Dr. Chasse that the December 3, 2001 work injury aggravated his prior injury. EX 34 at 146. On examination, Dr. Chasse observed restricted range of motion of the cervical spine, tenderness in the cervical spine and left trapezius muscle. EX 34 at 146-147. He imposed work restrictions for two weeks precluding overhead work, work in confined spaces, prolonged crawling or kneeling and lifting more than 30 pounds. CX 8 at 165-166. Dr. Chasse increased the frequency of the Claimant's treatment for several months through September 2003 following this incident and then the Claimant was able to reduce the frequency of his visits to once per month. EX 34 at 145, 147, 194-222. In May 2002, Dr. Chasse assigned the Claimant work restrictions for two months as he had been working in tanks and overhead which increased neck pain and headache. CX 8 at 153, 169-170. In progress notes dated August 6, 2003, and January 25, 2005, and copied to BIW Workers' Compensation Department, Dr. Chasse identified the date of injury as December 3, 2001. EX 34 at 131, 125.

From September 2003 through July 2004, the Claimant saw Dr. Chasse approximately once per month for manipulation therapy. CX 8 201-207. In the Fall of 2004, the Claimant began seeing Dr. Chasse approximately every two weeks complaining of neck pain and bad headaches. CX 8 at 207-210. In early January 2005, the Claimant's visits increased to once per week and he was complaining of increased neck pain which radiated to the right arm. CX 8 at 210. Dr. Chasse observed tenderness at the level of 5C over several visits prior to January 20, 2005. CX 8 at 205-210. On January 24, 2005, the Claimant told Dr. Chasse that he fell down

stairs at work and re-injured his neck and he complained of pain in the neck and low back. CX 8 at 210, 216. Dr. Chasse performed manipulation therapy on the Claimant's low back and neck areas. CX 8 at 211-212. His low back area had improved to the point that he did not receive additional manipulative therapy after February 9, 2005. CX 8 at 212-214. The Claimant continued to complain of neck pain and headache and he continued to receive the same manipulative treatment for these conditions that he had received prior to the January 20, 2005 slip and fall incident. CX 8 at 210-212.

4. Christopher Brigham, M.D.

Dr. Brigham performed an independent medical evaluation of the claimant on November 12, 1996. EX 40 and CX 7. Dr. Brigham stated that the origin of the Claimant's "chronic neck discomfort is unclear, although he does have evidence of myofascial pain syndrome, with a trigger point noted on examination today." EX 40 at 285. Dr. Brigham went on to say that the Claimant's episodic headaches appear to be muscle contraction headaches, and that certain conditions such as physical activities or the positioning of his neck can cause increasing spasm in his left posterior neck area resulting in muscle contraction headache. EX 40 at 285. Although Dr. Brigham reports he would have expected the Claimant's condition to improve over this period of time, "it is not uncommon to have ongoing difficulties following a significant cervical injury." *Id*. Dr. Brigham opined that the Claimant's current complaints were causally related to his occupational injury of March 11, 1991. *Id*. Dr. Brigham opined that the Claimant had reached maximum medical improvement and that he had a 5% impairment of the whole person as a result of his neck pain and headaches. EX 40 at 285-285A. He also stated that the Claimant's care, including manipulative care, was appropriate, but that a neurological consultation was recommended. EX 40 at 285A.

5. Stephen Klein, M.D.

Dr. Klein examined the Claimant on May 11, 1995, and again on January 20, 1998, at the request of BIW. EX 39. In his May 1995 report, Dr. Klein opined that the source of the headache was cervicogenic and that the neurological examination was unremarkable by objective criteria. EX 39 at 276. Dr. Klein indicated that from a "temporal standpoint…his current symptoms related to his injury of March 11, 1991 although the persistence of his neck pain as well as his headache is obscure." *Id.* Dr. Klein stated that in his opinion the Claimant should not be suffering from the effects of the 1991 injury and then immediately added that the headaches would appear to be related to the injury of that date. *Id*. Dr. Klein also stated that the treatment the Claimant was receiving, including osteopathic manipulation, was reasonable. EX 39 at 276-277.

In Dr. Klein's January 1998 report, he again opined that the Claimant's headaches are "cervicogenic in origin i.e. originating from chronic neck pain." EX 39 at 276. Dr. Klein did not think the headaches were migraines. EX 39 at 267. At the January 1998 evaluation, Dr. Klein observed almost full neck flexion, and full extension and full lateral motion. Dr. Klein stated that the Claimant's condition is temporally related to his work injury in 1991 but it is not causally related to that injury. EX 39 at 268. Dr. Klein reported that the effects of the work injury have ended and he can not explain why they continue to exist to the extent the Claimant

alleges. *Id.* Dr. Klein stated that there were no work restrictions necessary. *Id*. Dr. Klein also opined that, given the number of sessions of acupuncture treatment the Claimant has received and the even greater length of time he had received chiropractic treatment with only a transient benefit, neither of these treatments are justified. *Id*. Finally, Dr. Klein reiterated the recommendation he made in 1995, when he first evaluated the Claimant, that the Claimant be seen by a neurologist and have a trial of tricyclic anti-depressants to address his condition. EX 39 at 268-269.

6. Bernard Vigna, Jr., M.D.

Dr. Vigna is a neurologist who first saw the Claimant on December 3, 1999, and again on May 3, 2000, at the request of the Claimant's previous counsel. Dr. Vigna diagnosed chronic cervical strain with reactive muscle tightness and cephalgia best described as migranious as a consequence of the 1991 work injury. CX 10 at 249-253. The Claimant reported that the headaches occur one to two times per month lasting a day and that he misses one day of work per week. CX 10 at 249. An MRI of the cervical spine was normal. CX 10 at 253. Dr. Vigna recommended continued chiropractic care and abortive medication to address the headaches. *Id*.

The Claimant next saw Dr. Vigna on November 17, 2005 for a re-evaluation. At this point the Claimant reported headaches that now occurred every 4-5 days lasting a day and a half. He again stated he was missing one day of work per week. CX 10 at 254a. The Claimant also told Dr. Vigna he had hit his head at work two additional times in December 2002 and again in January 2005, which he alleged increased his neck pain and headaches. *Id*. In view of the increasing headaches and the significant use of Tylenol with codeine, Dr. Vigna stated that the Claimant needed ongoing aggressive attempts at preventive medication. CX 10 at 254b. Dr. Vigna prescribed Neurontin and then Lyrica. CX 10 at 254B; EX 41 at 292A and 291B.

The Claimant next saw Dr. Vigna on February 7, 2006. EX 41 at 291B. Dr. Vigna's note indicates that neither Neurontin nor Lyrica were effective and that the Claimant continued on Tylenol with codeine. Dr. Vigna prescribed Baclofen in an attempt to reduce muscular tightness and spasm in the neck and hopefully to ease headaches. EX 41 at 291B.

Dr. Vigna's medical license was suspended by the State of Maine Medical Licensing Board for six months beginning June 13, 2006 for, among other issues, failure to create or maintain appropriate medical records concerning his diagnosis, treatment and prescribing controlled drugs to several patients, but not the Claimant. EX 57.

7. John Pier, M.D.

Dr. Pier specializes in and is board certified in rehabilitation and pain medicine. EX 36 at 242; EX 51 at 3-4. Dr. Pier evaluated the Claimant on December 16, 2002, and more recently on March 24, 2005, generating two reports. EX 36 at 242, 239.[9] In the December 2002 report, Dr. Pier notes the work-related injury on March 1991 and he notes the Claimant's report that he re-aggravated his neck pain symptoms on December 3, 2001, when he struck his head. The Claimant also stated he had been assigned a lot of crawling around benches and bilges and was

[9] In addition to the two reports, Dr. Pier testified by deposition on May 22, 2006. EX 51.

having more difficulty. EX 36 at 242. Dr. Pier's report reflects the Claimant told him he has neck pain with movement and experiences headaches one to two times per week but he gets a severe headache only once per month. EX 36 at 243. Dr. Pier also pointed out that the Claimant had only stopped manual or manipulative treatments for a period of two months since the early 1990s. *Id*. The Claimant told Dr. Pier that he takes Tylenol with codeine on rare occasions. *Id.*

On examination in December 2002, Dr. Pier observed significant restriction in the upper cervical spine with right rotation to C3-4. Palpitation right at C2-3, C3-4 triggers pain to the base of the occiput. EX 36 at 243. Dr. Pier diagnosed intermittent cervical pain possibly related to cervical facet pain versus mechanical restriction, cervicogenic headache by patient report, secondary migraine likely triggered by cervicogenic/tension headache. EX 36 at 244.

Dr. Pier explained the Claimant has upper trapezius pain and tender points which radiate to the suboccipital region consistent with trigger points which can trigger tension headaches and that the Claimant had upper cervical range of motion restrictions which can also trigger headaches. EX 36 at 246. Although he explained that the rest of the Claimant's complaints were mainly subjective, he stated "this was not unusual in this clinical picture." *Id.* Dr. Pier opined that "within a reasonable degree of medical probability," the Claimant's symptoms are "aggravated by his employment" and although it is difficult to state any underlying condition is caused by his employment his subjective complaints have been consistent and persistent since the injury in 1991. *Id*. Dr. Pier concluded that "tension headache, secondary migraines are likely multifactorial and may not correlate with the dates of injury 1991, 2001." EX 36 at 246-247. After again stating the headaches are likely multifactorial, Dr. Pier stated he would "not rule out the possible contribution from the work related position change in 2001 and the work related trauma in 1991." EX 36 at 247, see also EX 51 at 19-20. Dr. Pier stated that work restrictions, including no work in very tight confined spaces and limited overhead work, are appropriate. EX 36 at 245. At his deposition in May 2006, Dr. Pier stated the Claimant reaggravated his chronic neck pain and intermittent headache conditions by hitting his head in 2001. EX 51 at 10. However, Dr. Pier testified that he did not believe the 2001 incident significantly contributes to the Claimant's current problem stating "I'm not convinced that it was enough of a trauma to significantly accelerate an underlying condition. I think he was getting to the point in 2001 where his symptoms have progressed to the point where he is more uncomfortable and is having more and more difficulty in tight spaces I'm not sure it is one specific date of injury, however, which contributes to a significant degree.' EX 51 at 10-11.

In his 2002 report, Dr. Pier explained that there are potential non-work related conditions which can aggravate tension headaches. EX 36 at 246. At deposition, Dr. Pier reiterated his opinion stating there are "many different things that precipitate tension-type headaches" but Dr. Pier also stated he was not "blaming those things and saying they're causing them" but rather that it is "impossible for me as a physician to state on a more likely than not basis an exact etiology of this gentleman's headaches." EX 51 at 19-20. Dr. Pier acknowledged that tension-type and migraine-type headaches can occur in individuals with no known head or neck trauma. EX 51 at 20.

As for chiropractic or osteopathic manipulation treatment, Dr. Pier opined past treatment had been reasonable. EX 36 at 246-246; EX 51 at 14-15, 17-19. As for future treatment Dr. Pier

stated this treatment is not curative and at this point appears to have a reached a point of maintenance care. Dr. Pier commented in his 2002 report that he was "not sure 20 years of manual care is indicated for any one diagnosis." EX 36 at 246. Therefore, he opined that intermittent treatment for periods of acute flare would be reasonable with the expectation this would be four to six visits over a six to 12 month period. EX 36 at 245-246; EX 51 at 18. At deposition, Dr. Pier stated ongoing manipulative therapy treatment over 10 years after the 1991 injury was not appropriate. EX 51 at 17-18. He explained that after 10 years the treatment is not curative, but palliative meaning perhaps an improvement in symptoms in the short term. EX 51 at 18. As a rehabilitation and pain medicine specialist, Dr. Pier explained that studies show that in dealing with chronic pain the more effective treatment is to transition an individual to an independent program (exercises and stretches) where they assume control or ownership of their pain syndrome and do better than with a passive manipulation. *Id.* Dr. Pier testified that aside from the fact the manipulative therapy is not curative, he was not aware of any studies showing that individuals receiving long-term chiropractic care do better than individuals who manage pain without chiropractic care. EX 51 at 17, 28-31.

On March 24, 2005, Dr. Pier examined and evaluated the Claimant for a second time following the injury of January 20, 2005 where he slipped on stairs and landed on his gluteal region. EX 36 at 239. After undergoing chiropractic care, the Claimant told Dr. Pier his back pain had resolved. *Id.* The Claimant also reported that he has continued to have neck pain, but that his neck pain was not any worse after his slip and fall. The Claimant reported his neck pain was now back to baseline, although he reported his baseline was slowly declining. *Id*. An MRI on February 7, 2005 reflected spondylosis at C5-6 and C6-7, significant spondylotic change, left greater than right, at C6-7 and a broad based posterior spur at C5-6. *Id*.

On examination, Dr. Pier observed palpatory tenderness in the suboccipital region and paraspinal musculature at C5-6 and C6-7 and pain in the left superior trapezius. EX 36 at 239. Dr. Pier diagnosed cervical spondylotic pain with intermittent cervical pain. *Id*. Dr. Pier concluded that the Claimant continues to have cervical pain and notes that the injury of January 20, 2005 appears to have resolved with a short course of chiropractic care and his neck pain is no worse as a result of this injury. EX 6 at 240. As the back pain has resolved, Dr. Pier did not have any recommendations for treatment for the January 2005 lumbar spine date of injury. *Id*. However, with regard to the cervical spine he stated the Claimant has cervical spondylotic pain and intermittent radicular symptoms and he opined that the Claimant's subjective complaints are consistent with the objective MRI findings. *Id*. Dr. Pier recommends continued stretches and strengthening of the anterior pectoralis musculature and scapular stabilizers as well as cervical retraction exercises. He concluded that if pain flares occasional use of chiropractic care is reasonable from a palliative care standpoint if it continues to keep the Claimant functional but such treatment is not curative. *Id*.; EX 51 at 18-19. Dr. Pier opined that he was not convinced that treatment for the cervical spine beyond the first few weeks would have been related to the January 2005 injury as the Claimant rapidly returned to baseline. *Id*. Finally, Dr Pier opined that permanent work restrictions precluding work in confined spaces and permitting only limited overhead work were appropriate and would permit the Claimant to work full-time. *Id.*

At his 2006 deposition, Dr. Pier opined that he did not believe the 2001 incident is likely to significantly contribute to the Claimant's current difficulties, although by 2001 the Claimant

was getting to a point where his symptoms had progressed and he was more uncomfortable and having difficulty working in tight spaces. EX 51 at 10-11. Later on, in an effort to respond to the Employer's counsel's inquiry as to whether the need for work restrictions after the 2001 injury was due to the natural progression of the pre-existing underlying condition or the result of a December 2001 aggravation, Dr. Pier stated that as for the Claimant's current condition, the Claimant was "primarily seeing the effects of--of time rather than individual traumas. 2001 may contribute, but it would be impossible for me to state how much. And again, I--I don't have the significant trauma 2001 that he describes in 1991… He basically says confined spaces and hitting the head and not a -- a singular event. And so I tend to favor cumulative effects of -- of time rather than traumas; but I can't sit here and give an exact percentage on that." EX 51 at 21-22. Dr. Pier went on to say that by "cumulative effects of time" he meant the natural progression of the degenerative process. EX 51 at 23.

8. Seth Kolkin, M.D.

Seth Kolkin, M.D., is board certified in psychiatry and neurology and qualified in neurophysiology. EX 48 at 360. Dr. Kolkin evaluated the Claimant at the Employer's request on April 12, 2006. Dr. Kolkin was aware of the December 3, 2001 incident in which the Claimant hit his head coming out of the C Ways area. EX 49 at 363. Dr. Kolkin reported that his examination was benign, although he observed that Claimant holds his head stiffly and has limited lateral flexion. EX 49 at 364. He was also cognizant of the January 20, 2005 incident in which the Claimant slipped on stairs and fell on his low back. EX 49 at 364. Dr Kolkin reviewed the Claimant's medical records including a "Lead Surveillance Questionnaire" completed by the Claimant on October 18, 1989, in which the Claimant placed a check mark indicating he had experienced frequent or severe headaches and trouble with vision, ringing in his ears, nausea and muscle or joint pain. EX 49 at 365. After evaluating the medical records, Dr. Kolkin concluded that the Claimant's headaches were migraine headaches. EX 49 at 367. However, Dr. Kolkin also stated that there was no known physiologic/causal relationship between the March 1991 injury and his ongoing subjective symptoms. EX 49 at 368. Dr. Kolkin noted that neck pain is a frequent feature of migraine headache, and he opined that the Claimant's symptoms are more consistent with long-standing common migraine headaches unrelated to his work. *Id*. For instance, Dr. Kolkin stated that waking up with a severe migrainous headache, one with pain, light sensitivity, nausea and emesis is more consistent with migraine than with cervicogenic headaches, which he explained "usually occur as a culmination of an episode of increasing pain with activity through the day." *Id*. Dr. Kolkin opined that the history, character and pattern of the Claimant's headaches are more consistent with long-standing common migraine headaches unrelated to his work.

Dr. Kolkin noted that in addition to headache the Claimant has ongoing complaints of musculoskeletal neck discomfort, for which there is no apparent underlying etiology to these subjective symptoms. EX 49 at 368. The MRI findings are consistent with findings commonly seen with asymptomatic individuals. Dr. Kolkin concluded that the medical records and the Claimant's own report show that the effects of the latter two injuries were transient and did not have a lasting effect on either his neck pain or headache. EX 49 at 368. Dr. Kolkin determined that the Claimant had a full-time work capacity, but for his subjective comfort he should avoid prolonged overhead work and work in confined spaces in awkward positions. *Id.* Finally, Dr.

Kolkin opined that missing work for headache could not reasonably be attributed to the March 1991 injury as it was "much more likely than not that he has a typical presentation of a common problem, migraine headaches, as the etiology of his headaches than an unusual presentation with symptoms following an apparently minor injury, no objective pathology and an 'obscure etiology.'" *Id*.

C. Does the 1997 Consent Decree Issued by the Maine Worker's Compensation Board Have Collateral Estoppel Effect Precluding the Employer From Challenging Causation With Regard to the 1991 Injury

The Claimant argues that the "issue of whether …[Claimant's] neck and head pain were caused by his injury in 1991 was litigated before the State of Maine Workers' Compensation Board." Cl. Br. at 5.[10] The Claimant contends that the litigation "resulted in a consent decree in which the parties agreed that…[the Claimant] suffered an injury to his head, neck and back on March 11, 1991" which arose out of his work at BIW.[11] *Id*. Thus, the Claimant asserts BIW is precluded by collateral estoppel principles from arguing, in the present matter, that the Claimant's neck pain and headaches are not work related. Cl. Br. at 5-6.

The Employer asserts that it is not prohibited "by res judicata principles from asserting that the Claimant's current problems are no longer work related." BIW R. Br. at 3.[12] The Employer acknowledges that it agreed that there was a head and neck injury in 1991. However, the Employer contends that "[i]t did not agree that the 1991 injury involved headaches, nor that they were incapacitating." BIW R.Br. at 3. In addition, Employer argues that the fact there was an agreement in 1997 that there was a work injury in 1991 does not preclude the Employer from asserting that the symptoms alleged currently and the injury are no longer connected. *Id.* Stated differently, the Employer argues "[w]hen there is no longer a causal connection, the Employer can certainly request a review to assess that issue" citing 33 U.S.C. § 922.[13] *Id.*

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[10] The Claimant's brief is not paginated, requiring the undersigned to handwrite page numbers on the brief. In the future, briefs lacking page numbers will be returned.

[11] The Employer correctly points out that although the Claimant alleged an injury to the neck, head and back, the Consent Decree found only that the Claimant had an injury to the neck and head and did not find an injury to the back. BIW R.Br. at 1, *see also* CX 23 ¶¶1 and 4.

[12] The Claimant argues collateral estoppel principles are applicable, whereas, the Employer asserts principles of res judicata are invoked. Res judicata principles provide that a final judgment on the merits precludes the parties or their privies from relitigating issues that were or could have been raised in that action in a subsequent action. Collateral estoppel principles instruct that once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties. In general, collateral estoppel applies to preclude relitigation of the same issues and res judicata precludes relitigation of the same claim. *Arizona v. California*, 530 U.S. 392, 414 (2000).

[13] Section 22 of the Act, 33 U.S.C. §922, titled Modification of Awards, provides in pertinent part, "Upon his own initiative, or upon the application of any party in interest . . . on the ground of change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." Modification of an award based on a change in a

In early 1997, the Maine Workers' Compensation Board issued a Consent Decree based upon the parties' stipulations, finding that the Claimant suffered a head and neck injury on March 11, 1991 which arose out of and in the course of his employment at BIW. CX 23 ¶4.[14] "[F]actual findings of a state court or administrative tribunal are entitled to collateral estoppel effect in other state or federal administrative tribunals." *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105, 107 (1995); *see also Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281 (1980); *Barlow v. Western Asbestos Co.*, 20 BRBS 179, 180 (1988). However, in *Formoso* the Benefits Review Board (the "Board") also stated that "the doctrine of collateral estoppel bars only relitigation of a particular legal or factual issue that was necessarily litigated and actually decided in a previous suit." 29 BRBS at 107; *see also U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-422 (1966) (the principles of collateral estoppel and res judicata apply "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate"); *Dixon v. John J. McMullen & Assoc., Inc.* 13 BRBS 707, 714-715 (1981).

The doctrine of collateral estoppel or issue preclusion precludes relitigation of the same issue between the same parties in future litigation. *Chavez v. Todd Shipyards Corp*., 28 BRBS 185 (1994) (en banc), aff'g 27 BRBS 80 (1993), aff'd sub nom *Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309 (9th Cir. 1998). In general, collateral effect is appropriate if issues and the burdens of proof in the two proceedings are the same and if the issues were necessarily and actually litigated in the prior adjudication. *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105, 107 (1995); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988); *Ortiz v. Todd Shipyards Corp*., 25 BRBS 228 (1991). Similarly, the First Circuit has considered four factors in determining whether collateral estoppel is appropriate: (1) are the issues the same; (2) was the issue actually litigated in the prior proceeding; (3) was the issue determined by a valid and binding final judgment; and (4) whether the determination of the issue in the prior proceeding was central to the final judgment or order. *Faigin v. Kelly*, 184 F.3d 67, 78 (1st Cir. 1999); *Acevedo-Garcia v. Vera-Monroig*, 351 F.3d 547, 575-576 (1st Cir. 2003).

The Maine Workers' Compensation Board Consent Decree states that the Claimant sustained an injury to his neck and head as the result of a work-related incident on March 11, 1991. The terms of the decree do not explicitly state whether the head injury included headaches and the Employer asserts that it never agreed that the injury involved headaches. However, the medical records predating the issuance of the decree in 1997 demonstrate that the Claimant complained of neck pain and intermittent headaches following the March 1991 injury, he

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claimant's condition may be granted where the claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Wynn v. Clevenger Corp*., 21 BRBS 290, 292 (1988). Traditional notions of res judicata do not apply to modification proceedings, but modification proceedings may not be used to retry a case or protect litigants from counsel's litigation errors. The Employer did not present a claim for modification pursuant to Section 22 of the Act. Therefore, the Employer's reference to Section 22 of the Act is not helpful in resolving the question of whether the consent decree precludes it from challenging causation with regard to the 1991 neck and head injury.

[14] The date the Consent Decree was entered by the Maine Workers' Compensation Board is not included on the copy of the decree submitted to the undersigned. CX 23. However, based upon the dates the parties signed the decree, I have inferred that the decree was likely issued sometime in early 1997.

reported the headaches and was treated by BIW Health Department for the headaches. CX 15 at 295-304. The evidence also shows that the Claimant was treated for chronic neck pain and headache by several physicians between 1991 and 1997. Based on the record of medical treatment between 1991 and the consent decree in 1997, I find that the head injury explicitly referred to in the Consent Decree must have included headaches as there was no treatment for any other aspect of an injury to the head during this period.

The issue of whether the neck and head injury were related to the Claimant's work at BIW was litigated by the parties and the parties ultimately stipulated to this fact as expressly indicated in the Maine Consent Decree. The Lead Surveillance form completed by the Claimant in 1989 in which he checked that he had headache, blurred vision, metallic taste in the mouth, and nausea was in BIW's possession at the time of the 1997 Consent Decree. EX 33 at 96. While this document certainly suggests that the Claimant experienced severe or migraine type headaches in 1989 (based upon the conditions checked), BIW could have raised the argument it raises in the present matter, that is, that the Claimant's headaches pre-existed the 1991 work injury, in the proceeding before the State Workers' Compensation Board, but it did not do so. As BIW had a full and fair opportunity to raise the argument that the headaches pre-dated the 1991 work injury in defending the 1991 claim before the Maine Compensation Board, it cannot now raise the issue in this matter.

The Consent Decree is a valid final judgment. The question of whether the neck and head injury of 1991 were work-related was central to the Maine Consent Order. Accordingly, I conclude that the Employer is precluded from contesting causation with regard to the neck and head (including headaches) injuries through early 1997 when the Consent Order was issued.

The Employer may, however, attempt to establish that events subsequent to the Consent Decree have intervened to break the chain of causation.

D. Causation

An individual seeking benefits under the Act must, as an initial matter, establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. §902(2). *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. §920(a). The Claimant establishes a prima facie case by proving that he suffered some harm or pain and that working conditions existed which could have caused the harm. *Brown*, 194 F.3d at 4; *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Murphy v. S.C.A./Shayne Brothers*, 7 BRBS 309 (1977) *aff'd mem*. 600 F.2d 280 (D.C. Cir. 1979); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). In presenting his case, the Claimant is not required to introduce affirmative evidence that the working conditions in fact caused his harm; rather, the Claimant must show that working conditions existed which could have caused his harm. *U.S. Industries/Federal Sheet Metal, Inc., v. Dir., OWCP (Riley)*, 455 U.S. 608 (1982). In establishing that an injury is work-related, the Claimant need not prove that the employment-related exposures were the predominant or sole cause of the injury. If the injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting

disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

Once a claimant establishes a prima facie case, the claimant has invoked the presumption, and the burden of proof shifts to employer to rebut it with substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Bath Iron Works Corp. v. Dir., OWCP, (Shorette)*, 109 F.3d 53 (1st Cir. 1997); *Merrill*, 25 BRBS at 144; *Parsons Corp. of California v. Dir., OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. District Parking Management Co*., 363 F. 2d 682 (D.C. Cir. 1966); *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984). Under the substantial evidence standard, an employer need not establish another agency of causation to rebut the presumption; it is sufficient if a physician unequivocally states to a reasonable degree of medical certainty that the harm suffered by the worker is not related to employment. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000); *Kier*, 16 BRBS at 128. If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. See *Del Vecchio v. Bowers*, 196 U.S. 280 (1935); *Holmes v. Universal Maritime Serv. Corp*., 29 BRBS 18 (1995); *Sprague v. Dir., OWCP*, 688 F. 2d 862 (1st Cir. 1982).

Under the "aggravation rule" an employment-related injury need not be the sole cause or primary factor in a disability and a work-related aggravation of a preexisting condition constitutes an injury within the meaning of the LHWCA. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986) (*en banc*); *Turner v. Chesapeake and Potomac Telephone Co*., 16 BRBS 255, 257 (1984); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2nd Cir. 1982). If an employment-related injury contributes to, combines with or aggravates a pre-existing disease, the entire resulting condition is compensable and the relative contributions of the work-related injury and the prior condition are not evaluated to determine the claimant's entitlement to benefits. *Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968). The last aggravation need not be the primary contributor to the resulting injury. *Lopez v. Southern Stevedores*, 23 BRBS 295, 297 (1990). Further, the last aggravation does not need to interact with the pre-existing underlying injury itself to produce a worsening of the underlying impairment. The aggravation rule can apply in cases where the last aggravation combined with the underlying injury merely in an additive way and resulted in a greater overall impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). The aggravation rule applies "even though the worker did not incur the greater part of his injury with that particular employer." *Strachan Shipping Co. v. Nash,* 782 F.2d 513, 519 (5th Cir. 1986).

The Claimant contends that he continues to experience neck pain and headaches as a result of the 1991 work injury and that he has aggravated these conditions as a result of work injuries on December 3, 2001 and January 20, 2005.[15] The Employer argues first that any effects of the 1991 injury have long since resolved or that the headaches pre-existed the injury and the Claimant's current condition is no longer related to the 1991 injury. BIW Br. at 12-13. The

[15] Disregarding the Court's explicit Briefing Order, the Claimant cited no legal authority in support of his contention that the injuries alleged on December 3, 2001 and January 20, 2005 were related to his employment or were the result of aggravations of his initial head and neck injury sustained as a result of the 1991 injury. *See* Briefing Order June 28, 2006 no. 4.

Employer further asserts that the 2001 incident was not sufficient to cause injury, and alternatively, if there was an injury resulting from this incident, it was temporary and did not aggravate the Claimant's head/neck condition in any way. BIW Br. at 13. With regard to the 2005 injury, the Employer asserts that the injury did not involve an injury to the Claimant's neck or head. BIW Br. at 13-14. I will evaluate the evidence as to each date of injury.

1. The March 11, 1991 Injury

Although the Claimant's brief on this issue is cursory and does not address the issue utilizing the foregoing legal analysis, it appears that the Claimant contends that the effects of the 1991 injury on his neck pain and headaches is ongoing and that the work injuries of 2001 and 2005 have aggravated his neck pain and headaches.[16] Dr. Baker treated the Claimant's neck pain and headache following the 1991 injury until approximately 1995. Notes from the Claimant's primary care physician, Dr. Austin, reflect that from 1996 to the present the Claimant has consistently reported neck pain and intermittent headaches as a result of the 1991 injury. Dr. Austin diagnosed chronic neck pain resulting from the 1991 work injury. The Claimant has received either osteopathic or chiropractic manipulation therapy from Dr. Baker and Dr. Chasse, respectively, at different intervals depending upon his activity level and physical condition since 1991. The Claimant was evaluated by Dr. Vigna a neurologist in 1999 and 2000 and at that time, Dr. Vigna diagnosed chronic cervical strain with reactive muscle tightness and cephalgia or headaches best described as migrainous as a result of the 1991 work injury. Dr. Brigham, who examined the Claimant at the request of the Employer in 1996, opined that he would have expected the Claimant's symptoms to improve by the time he saw him in November 1996, but that it was not uncommon to have ongoing difficulties after a significant cervical injury. Dr. Brigham concluded that the complaints of chronic neck pain, stiffness and occasional severe headache are related to the work injury of 1991.

In addition to the physicians' opinions and diagnosis, the Claimant testified that after his 1991 injury he experienced chronic neck pain which could flare-up depending upon the level of his physical activities, as well as intermittent severe headache. Based upon the foregoing evidence, the Claimant has established harm and working conditions which could have caused the harm. Accordingly, the Claimant has successfully invoked the Section 20(a) presumption of causation.

The Employer may rebut the presumption by presenting evidence sufficient to sever the connection between the harm and the Claimant's employment at the shipyard. The Employer relies upon the opinions of Dr. Klein and Dr. Kolkin in its effort to rebut the presumption.

In 1995, Dr. Klein opined that the Claimant's neck pain and headaches were cervicogenic and were caused by his March 1991 work injury, even though he concluded the Claimant should not still be experiencing the effects of the 1991 injury and even though he could not explain the

[16] As noted in the discussion above, the Employer is precluded from asserting that the Claimant's headaches pre-existed his 1991 work injury because the Lead Surveillance Questionnaire form the Employer relies upon to support this assertion was in existence at the time the parties signed the 1997 Maine Consent Decree. At that time the Employer could have, but did not, argue that the headaches were a pre-existing condition.

symptoms the Claimant reported. In his January 20, 1998 report, Dr. Klein again concluded that the Claimant's headaches were not migraines, but rather are cevicogenic in origin, that is, originating from chronic neck pain. At the January 1998 evaluation, Dr. Klein observed almost full neck flexion, and full extension and full lateral motion. Dr. Klein also reviewed x-rays of the Claimant's cervical spine taken by Dr. Chasse's office and he concluded the x-rays showed only a loss of normal cervical lordosis. In his 1998 report, he opined that the effects of the 1991 injury have ended while acknowledging that he cannot explain why the Claimant continues to have the degree of symptoms he reports.

Dr. Kolkin performed an independent medical evaluation of the Claimant on April 12, 2006. He concluded that the examination was benign although he observed limited lateral flexion of the neck. Dr. Kolkin also reviewed the records of treatment the Claimant received from other physicians following the initial 1991 injury. Dr. Kolkin noted that the only medical record which predated March 1991, and the first injury at issue herein, is a Lead Surveillance Questionnaire completed in October 1989 in which the Claimant reported having "frequent and severe headaches." EX 33. Based upon his examination and review of the Claimant's medical records after March 1991, Dr. Kolkin stated that there is no known physiologic/causal relationship between the 1991 injury and the Claimant's ongoing subjective symptoms. Dr. Kolkin also stated the headaches could be causing neck pain. With regard to the complaints of neck pain, Dr. Kolkin opined that there is no apparent etiology to these subjective symptoms and the MRI findings are consistent with individuals with no symptoms of neck pain. He concluded therefore that it was more likely than not that the Claimant has a common problem, migraine headaches as the cause of his headaches, rather than an unusual presentation with symptoms following a minor injury, with no objective pathology and an obscure etiology.

The threshold for rebutting the presumption of causation is not high. In light of this, the opinions of Dr. Klein and Dr. Kolkin indicating that the Claimant's current neck pain and occasional headache are not the result of the 1991 injury, are sufficient to rebut the Section 20(a) presumption. Therefore, the Employer has successfully rebutted the presumption with regard to the 1991 injury and I must consider all of the evidence in evaluating whether the Claimant's current neck pain and headache are the result of that injury.

The Claimant's doctors, Dr. Austin and Dr. Chasse, have treated the Claimant since approximately 1996 and have noted neck stiffness, reduced range of motion, and muscle tightness at various points of time over this approximately nine year period. These are objective physical symptoms. The Claimant stated that he had experienced neck pain and intermittently severe headaches since the 1991 injury. The subjective complaints of neck pain and headache are consistent with the objective findings observed by the Claimant's physicians at various points over the course of their treatment of the Claimant.[17]

[17] The Claimant completed a Lead Surveillance Questionnaire in 1989, in which he stated that he had experienced frequent or severe headaches, eye trouble – blurred vision, ringing in the ears, metallic taste in the mouth, nausea, frequent constipation and muscle or joint pain. CX 15; EX 33. The Claimant testified that in 1989 when he checked he had headaches on the questionnaire form, he meant when he had the flu or was sick. TR 40. On re-direct examination, the Claimant stated that before 1989 he had not had blurred vision problems in the absence of headaches, suggesting that he did have headaches accompanied by blurred vision prior to 1989. TR 43. The Claimant also stated that he had experienced a metallic taste in his mouth and ringing in his ears prior to 1989 but stated those symptoms, which frequently accompany migraine headache, were not associated with headaches. *Id*. I

In contrast, Dr. Klein evaluated the Claimant twice, the most recent time being in 1998 and Dr. Kolkin evaluated the Claimant once in 2006. Neither Drs. Klein nor Kolkin are treating physicians.[18] Having concluded in 1995 that the Claimant's neck pain and headaches were caused by his 1991 work injury, by 1998 Dr. Klein concludes that the neck pain and headaches were not related to the 1991 work injury. On the basis of virtually the same evidence, and similar analysis, Dr. Klein offered two different opinions, one in 1995 and the other in 1998, on whether the Claimant's neck pain and headache resulted from his work injury of 1991. Dr. Klein does not adequately explain the different conclusions he reached regarding causation and his failure to do so undermines his opinion that the Claimant's current chronic neck pain and intermittent headache are not caused by the 1991 work injury.

Dr. Kolkin's conclusion that the neck pain and headaches were not caused by the 1991 injury but rather were longstanding migraine headaches which predated that injury is based upon the absence of objective evidence and upon the Lead Surveillance Questionnaire the Claimant completed in 1989. Although the Claimant had few objective indicia supporting his complaints at the time of Dr. Kolkin's examination, at various points since the 1991 injury, the Claimant's complaints have been consistent with objective evidence including restricted range of motion in the cervical spine, tender points and muscle tightness. As Dr. Kolkin saw the Claimant once, while the Claimant's treating physicians saw him several times over many years and noted the objective signs, I credit their opinions over that of Dr. Kolkin on this issue. In addition, as I have concluded that the Employer is precluded by principles of collateral estoppel from asserting that the Claimant's headaches pre-existed his 1991 work injury, I cannot accept Dr. Kolkin's opinion which is based in part upon this theory of causation. Accordingly, I find that the Claimant has demonstrated that his current chronic neck pain and occasional severe headache are caused by his 1991 injury.

2. The December 3, 2001 Injury

The Claimant contends that he aggravated his chronic neck pain and headache condition as a result of this injury.[19] The Employer argues that the effects of this incident were minor and have resolved. After the Claimant hit his head coming out from the C Ways, he reported increased neck stiffness and pain and an increase in the frequency of headaches. The Claimant stated that after he hit his head, his stiff neck returned, but dissipated within four or five days. However, he also stated that his level of constant discomfort increased. Dr. Chasse's notes

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have concluded that the Employer is precluded from raising the headaches as a pre-existing condition as the Employer could have, but elected not, to raise this issue when it signed the Maine Consent Decree in early 1997.

[18] Dr. Pier also examined the Claimant on behalf of the Employer in December 2002 and again on March 24, 2005 and he testified by deposition. Taken as a whole, I find Dr. Pier's reports and conclusions on causation equivocal and of little assistance in deciding this critical issue with regard to the 1991 injury. For example, in December 2002, Dr. Pier observed significant restriction in the upper cervical spine with right rotation, trigger points radiating to the suboccipital region. While noting that the rest of the Claimant's complaints were "subjective" he stated this was not unusual in this clinical picture. He testified that tension headaches were multifactorial and it was impossible for him as a physician to state on a more likely than not basis the exact etiology for the Claimant's headaches.

[19] The Claimant's brief does not address the specific medical evidence as it relates to the December 2001 injury in any meaningful manner.

reflect that the Claimant saw him almost immediately following the December incident in which he hit his head. Dr. Chasse increased the frequency of the Claimant's visit for several months following the December 2001 injury. Dr. Austin, the primary care physician, did not offer an opinion as to whether the 2001 injury aggravated the Claimant's chronic neck pain and headaches. However, Dr. Chasse and Dr. Austin eventually imposed permanent work restrictions precluding work in confined spaces in November 2002. Evaluated as a whole, Dr. Chasse's notes and his communications with BIW reflect that he concluded that the December 2001 incident aggravated the Claimant's pre-existing chronic neck pain and headaches. Based upon the foregoing evidence, I find that the Claimant has established harm and that working conditions existed which could have caused the harm. Therefore, the Claimant is entitled to the assistance of the Section 20(a) presumption of causation.

The Employer attempts to rebut the presumption by asserting that the Claimant's neck pain and headaches returned to baseline shortly after the December 3, 2001 incident pointing to opinions by Dr. Pier and Dr. Kolkin. BIW Br. at 12-13. The Employer contends that, in contrast to his hearing testimony, the Claimant told both Dr. Pier and Dr. Kolkin, who examined him at the Employer's request, that his neck symptoms flared up after hitting his head on December 3, 2001, but that his symptoms returned to baseline after a period of time. *Id.* In his December 16, 2002 report, Dr. Pier observed pain and tender points and cervical range of motion restrictions both of which can trigger headaches. He said that within a "reasonable degree of medical probability" the Claimant's symptoms were aggravated by his employment and then he concluded that "tension headache, secondary migraines are likely multifactorial and may not correlate with the dates of injury 1991, 2001." EX 36 at 246-247. Immediately thereafter, Dr. Pier wrote that he would not "rule out the possible contribution from the work related position change in 2001 and the work related trauma in 1991." EX 36 at 247. At his deposition he stated it is "impossible for me as a physician to state on a more likely than not basis and exact etiology of …[the Claimant's] headaches." EX 51 at 19-20. Dr. Pier vacillated in his opinion on this point. After careful consideration and reading his reports and deposition testimony, I conclude that Dr. Pier's testimony and reports are not sufficient to either support the Claimant's position that the neck pain and headaches were related to the work injury of 2001 or to sever the connection between the ongoing neck pain and headaches and the December 3, 2001 injury, as the report and testimony do not unequivocally establish whether the Claimant's chronic neck pain and headaches were or were not aggravated by hitting his head on December 3, 2001.

Dr. Kolkin concluded that the history, character and pattern of the Claimant's symptoms were more consistent with long-standing common migraine headaches unrelated to his work. Dr. Kolkin stated that based upon the medical records which provide little objective support for the ongoing symptoms and the Claimant's statements, the effects of the December 2001 injury were transient and did not have a lasting effect upon his neck pain or headaches. I find that Dr. Kolkin's opinion is sufficient to rebut the presumption that the Claimant's neck pain and headache were aggravated when he hit his head on December 3, 2001 coming out of the C Ways area.

I must consider the evidence as a whole. I find that following the 2001 injury the Claimant's neck pain eventually returned to baseline based upon the Claimant's statements to Drs. Pier and Kolkin, the frequency of treatment with Dr. Chasse which was reduced several

months after the 2001 incident and on the Claimant's testimony at the hearing. With regard to headache, the Claimant has repeatedly and consistently stated that his headaches became more frequent after the 2001 incident. Dr. Chasse initially imposed temporary work restrictions of two weeks and then later two months. Dr. Chasse did not expressly state that the December 3, 2001 incident aggravated the chronic neck injury and headaches related to the 1991 work injury. However, he increased the frequency of his treatment of the Claimant for several months thereafter and his correspondence with BIW after the 2001 injury indicates he believed the 2001 injury aggravated the chronic neck pain and headache condition. In addition, both Dr. Chasse and Dr. Austin imposed permanent work restrictions following the 2001 injury which precluded work in confined spaces and minimal overhead work as those work activities aggravated the Claimant's chronic neck pain and headache. Dr. Pier agreed that the work restrictions were appropriate. Drs. Chasse and Austin are the treating chiropractor and primary care physician, respectively, and have treated the Claimant for several years. They have had the opportunity to evaluate the Claimant over time in periods of flare-up of the chronic neck pain and headache and in periods of relative stability. I credit their opinions over those of Dr. Pier which were inconsistent on this issue and, those of Dr. Kolkin who saw the Claimant once or twice. Accordingly, I find that the 2001 injury aggravated the Claimant's chronic neck pain and headache condition and is a new injury.

3. The January 20, 2005 Injury

The Claimant's brief does not discuss the specific evidence supporting his assertion that the chronic neck pain and intermittent headaches were caused or aggravated by his 2005 slip and fall injury. Cl. Br. at 3-5, 7-9. Rather, Claimant merely asserts that several physicians have determined that the "neck problems and headaches are related to his injury in 1991 or a later aggravation." Cl. Br. at 3. The Employer contends the January 20, 2005 incident involved an injury to the low back and not the cervical spine or head. BIW Br. at 13.

With regard to the January 20, 2005 slip and fall injury, the medical records submitted reflect that the injury was to the low back. The Claimant reports that during the period he was recovering from the back injury his headaches became more frequent and his neck pain increased.[20] However, the Claimant's testimony in this regard is not consistent with his contemporaneous statements to physicians or with the medical records. The Claimant's physician, Dr. Austin, stated that the back injury did not aggravate the neck pain or headaches because when he saw the Claimant on the day of the slip and fall incident, the Claimant provided him a history of increased symptoms related to the neck that predated his back injury. The Claimant's chiropractor, Dr. Chasse, did not offer an opinion as to whether the January 20, 2005 incident aggravated the Claimant's pre-existing chronic neck pain and headaches. However, Dr. Austin's opinion that the slip and fall did not aggravate the pre-existing chronic neck pain and headaches is supported by the treatment notes from Dr. Chasse. Those progress notes reflect that prior to the January 20, 2005 slip and fall, the Claimant was reporting increased neck pain, including radiating to the arm and numbness along with frequent headaches and he had increased the frequency of manipulation therapy. Thus, the Claimant was experiencing an increase in neck

[20] The treatment records from Dr. Chasse indicate that the Claimant hurt his low back in the slip and fall incident. His low back pain resolved after less than one month of manipulative therapy. CX 8 at 210-214. The Claimant has conceded that he is not alleging any ongoing low back condition. TR 7.

pain and headache in the few months before the 2005 work injury. After the slip and fall, the Claimant continued to complain of chronic neck pain and headaches and Dr. Chasse continued to provide the same chiropractic manipulation therapy he had been providing prior to January 20, 2005. In addition, Dr. Pier's report reflected that the Claimant told him that he continued to have neck pain, but that his neck pain was not any worse after his slip and fall. Other than the Claimant's statements on this issue at hearing, which I do not credit as they are contrary to his contemporaneous statements to physicians, and to the treatment records, there is no evidence that the slip and fall aggravated his chronic neck pain and headache condition.

After carefully evaluating the evidence, I find that the slip and fall incident in which the Claimant slipped on stairs and fell on his low back caused an injury to his lumbar spine which has since resolved and that the incident did not aggravate his chronic neck pain and headaches. The Claimant has not established harm related to his chronic neck pain and headache that can be associated with the January 20, 2005 incident. Accordingly, as the Claimant has not demonstrated that his current chronic neck pain and headaches were aggravated or caused by the slip and fall incident, Claimant has failed to establish harm caused or by aggravated by his 2005 work injury.

E. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. Nature of the Claimant's Disability

There are two approaches to determine the nature of a disability. The first method is to determine "whether an injury is permanent or temporary is to ascertain the date of 'maximum medical improvement.'" *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985) (citing *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977)). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979). Under the second approach, a disability will be considered permanent if the claimant's impairment "has continued for a lengthy period of time and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968).

In addressing the causation issue above, I declined to adopt the Employer's contention that the Claimant does not have any residual effects from the 1991 injury or that the 2001 injury did not aggravate the Claimant's condition. The Employer argues that the Claimant is not incapacitated by the 1991 injury as the Claimant has conceded that BIW accommodates his work restrictions. BIW Br. at 12-13. The Claimant has stated that he is able to work within his work restrictions except for the days when he has severe headache which incapacitates him from any activity. Dr. Brigham opined in 1996 that the Claimant had reached maximum medical improvement and had a 5% permanent partial impairment of the whole person as a result of his cervicothoracic spine impairment. Considering Dr. Brigham's opinion and in the absence of medical opinion that the Claimant's condition is not permanent, I find that the chronic neck pain and occasional headache are permanent impairments.

In addition, the Claimant's chronic neck pain and headache have existed since 1991. While the intensity of his symptoms may wax and wane depending upon his activities, there is no indication that his condition will improve. Accordingly, the Claimant has demonstrated that his impairment is permanent under the second approach to assessing permanency of impairments.

F. Reasonableness and Necessity of the Claimant's Medical Care

In its brief, the Employer challenges the reasonableness of the Claimant's ongoing osteopathic or chiropractic manipulation treatment. Neither the Employer nor the Claimant raised the issue of the appropriateness of medical care during the hearing on the Claimant's claim. The Employer did not identify the reasonableness of medical care in either of its Pre-Hearing Statements. ALJ EX 4; ALJ 12. However, the Claimant's Pre-hearing Statement indicates the claim is for compensation and medical benefits. ALJ EX 7; ALJ EX 11. In addition, at the deposition of Dr. Pier, both parties addressed the reasonableness of the Claimant's manipulative therapy, and Dr. Klein and Kolkin's reports also addressed the issue. As the claim covers medical benefits, and the parties' discussed this issue with several medical experts, the reasonableness of the medical treatment is properly before me.[21]

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). A determination of the reasonableness and necessity of medical treatment is a question of fact for the administrative law judge. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). Chiropractic treatment is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. 20 C.F.R. § 702.404. The issue before me is whether the chiropractic care provided to the Claimant was reasonable and medically necessary under the circumstances regardless of whether it was maintenance or curative medical care.

[21] The Claimant failed to address the issue of medical care in his brief.

The Employer contends that the Claimant's chiropractic/osteopathic manipulative treatments some fifteen years after the initial 1991 injury are not medically reasonable. BIW Br. at 14. The Employer relies upon the evaluation of Dr. Pier who stated that after fifteen years of such treatment on a regular basis without alleviating the complaints, the ongoing treatments were not curative and were no longer appropriate.[22] Dr. Pier recommended an independent program of home exercise and stretching as pain management studies have shown those programs are more effective in dealing with chronic pain than passive manipulation. Dr. Pier explained that manipulative therapy should be performed only on an intermittent basis to overcome plateaus or for periods of acute flare of symptoms associated with the Claimant's condition. He concluded that 4-6 visits every 6-12 months would be expected. Again in 2005, Dr. Pier recommended an exercise program and stretches and stated that occasional use of chiropractic care is reasonable from a subjective treatment point, noting such care is palliative, not curative, but is reasonable if it keeps the Claimant functional. Dr. Pier testified that aside from the fact the manipulative therapy is not curative, he was not aware of any studies showing that individuals receiving long-term chiropractic care do better than individuals who manage pain without chiropractic care.[23]

The medical records from Dr. Baker and Dr. Chasse show that the Claimant has received either osteopathic or chiropractic manipulation therapy on a continuous basis that varied in frequency from twice weekly to monthly, since the 1991 work injury, depending upon the Claimant's activities and symptoms. The Claimant did not present an opinion or explanation from his treating chiropractor or primary care physician as to why continued ongoing manipulative therapy many years after the 1991 injury and the 2001 exacerbation, continue to be reasonable and necessary. Considering the well supported medical opinion from Dr. Pier, who specializes in rehabilitation and pain management, and the absence of an explanation from the Claimant's chiropractor, I find that continued ongoing manipulative therapy was no longer reasonable and necessary for the chronic neck pain and headache condition as of Dr. Pier's March 24, 2005 opinion.[24]

The Employer also contends that it is not responsible for medical care provided by Dr. Vigna as his care was unreasonable. BIW Br. at 14. In support of this position, the Employer notes that Dr. Vigna was found incompetent by the Maine Board of Licensure. The Board found that Dr. Vigna was incompetent in failing to create or maintain medical records concerning his diagnosis, treatment and prescribing practice in relation to narcotic medications with some patients and for engaging in inappropriate relationships with a patient. The Board of Licensure's Decision and Order is certainly troubling and raises significant issues generally as to Dr. Vigna's

[22] Dr. Pier opined that past manipulative treatment had been reasonable.

[23] In addition to Dr. Pier, Drs. Brigham and Klein had expressed opinions on the reasonableness and necessity of Claimant's manipulative treatment at earlier periods of time. In 1996, Dr. Brigham stated that the ongoing manipulative care was appropriate at that time. By 1998, Dr. Klein explained that in light of the length of time the Claimant had received manipulative treatments with only a transient benefit, this treatment was not justified.

[24] As Dr. Pier stated, manipulative therapy treatment may be appropriate in the future on a short-term basis if the Claimant experiences a flare-up of symptoms or reaches a plateau. Presumably if the Claimant presented evidence of such a flare-up in conditions, short-term manipulative therapy treatment would be appropriate. If such treatment were denied, the Claimant could bring a claim for medical benefits at the time treatment were denied, if necessary.

qualifications and medical abilities. Nevertheless, the Claimant saw Dr. Vigna three times and he prescribed a muscle relaxant. Dr. Vigna's treatment of the Claimant does not appear to be unreasonable under the circumstances, in light of the Claimant's symptoms and past medical treatment. Therefore, I cannot conclude that Dr. Vigna's limited treatment of the Claimant was unreasonable. In addition, the Claimant had no knowledge of the Licensure Board's investigation of Dr. Vigna. Accordingly, the Employer is responsible for the past services Dr. Vigna provided the Claimant.

G. Is the Employer Entitled to Relief from Liability From the Special Fund Pursuant to Section 8(f) of the Act?

Section 8(f) of the Act limits an employer's liability for permanent partial disability, permanent total disability and death benefits to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. § 944, when the disability or death is not due solely to the injury which is the subject of the claim. 33 U.S.C. § 908(f); *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file a fully supported application for Section 8(f) relief with the District Director, Office of Workers' Compensation Programs ("OWCP"). 33 U.S.C. § 908(f); 20 C.F.R. § 702.321 (2004). The record shows that the Employer timely and properly submitted its application for Section 8(f) relief with OWCP on July 7, 2005. ALJX 1. Accordingly, I find that the Employer's application for Section 8(f) relief was timely filed, and I will proceed to review the merits of the Employer's application.

In addition to filing a timely and sufficiently documented application, an employer must meet three requirements to avail itself of Section 8(f) relief in cases of permanent partial disability: (1) the employee must have had a pre-existing permanent partial disability; (2) the pre-existing disability must have been manifest to the Employer; and (3) in cases of permanent partial disability, the current disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45 (1st Cir. 1997)(*Johnson*); *Perry v. Bath Iron Works Corp.*, 29 BRBS 57, 58 (1995) (*Perry)*. In the context of Section 8(f), a pre-existing permanent partial disability is one that would motivate a cautious employer to terminate an employee due to an enhanced risk of consequent compensation liability. *C&P Tel. Co. v. Director, OWCP (Glover)*, 564 F.2d 503, 512 (D.C. Cir. 1977). Medical records in existence at the time of the subsequent injury from which the condition was objectively determinable satisfy the manifest requirement. *Director, OWCP v. Universal Terminal & Stevedoring (De Nichilo)*, 575 F.2d 452, 454-57 (3d. Cir. 1978); *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40, 43-44 (1983). To satisfy the third element, "an employer is required to show the degree of disability attributable to the work-related injury, so that this amount may be compared to the total percentage of the partial disability for which coverage under the LHWCA is sought." *Johnson*, 129 F.3d at 51. In other words, an Employer is required to show a "quantification of the level of impairment that would ensue from the work-related injury alone." *Id.*

In the present matter, the Employer must establish that the Claimant had a pre-existing permanent partial disability. The Employer contends that the Claimant had a pre-existing recurring headache condition prior to his employment at BIW and that the condition was a

permanent, partial disability for purposes of Special Fund relief. BIW Br. at 15-16.[25] Upon review of the evidence submitted, I conclude there are no medical treatment records or diagnostic tests establishing that the Claimant had a pre-existing headache condition before the 1991 work injury.[26] The first medical records reflecting treatment for neck pain and headache are immediately following the work injury of 1991. Thus, the Employer cannot show a pre-existing permanent partial disability based upon headaches pre-dating the 1991 injury that was manifest to the Employer. As the Employer did not establish the first or second element required for Section 8(f) relief from liability, BIW is not entitled to Section 8(f) relief.

H. Average Weekly Wage

I have concluded that the Claimant's current condition is the result of his 1991 work injury and was aggravated by the 2001 work injury. The Claimant, citing *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 193 (1984), argues when an individual suffers multiple injuries to the same body part the average weekly wage for the most recent aggravation is that the proper wage for calculating compensation benefits. Cl Br. at 8-9. In contrast, the Employer asserts that the average weekly wage for the 2001 injury is not appropriate as that injury was "a temporary aggravation only." BIW R. Br. at 4. BIW contends that the parties stipulated to an average weekly wage of $464.07 in the Maine Workers' Compensation Consent Decree and that is the appropriate average weekly wage. *Id*.

A work-related aggravation of a pre-existing injury is compensable and is considered a new injury. *Del Vacchio,* 16 BRBS at 193. The average weekly wage in aggravation cases must be based upon the claimant's earnings at the time of the aggravation. As I have determined that the 2001 injury was an aggravation of the 1991 injury, it is a new injury. Therefore the Claimant's average weekly wage at the date of the December 3, 2001 injury is the appropriate average weekly wage for days claimed after December 3, 2001. The parties stipulated that the Claimant's average weekly wage at the time of the 2001 injury was $764.96. JX 1.

I. Compensation Due

The Claimant seeks compensation for various intermittent days he missed work as a result of headaches. I have concluded that the Claimant's current condition is the result of his 1991 work injury and was aggravated by the 2001 work injury. The Claimant claims he is entitled to 53 days of disability compensation benefits covering the period 2003 through April 5, 2006. Amended CX 20.[27] The Employer contends that the 1991 injury has resolved and that the 2001 injury did not aggravate the Claimant's neck and head problems or, that it was a temporary

[25] The Claimant took no position on this issue in his brief.

[26] The Lead Surveillance Questionnaire is the only evidence suggestive of a pre-existing headache condition and that is not medical diagnosis or treatment evidence. Additionally, I have concluded that the Employer is precluded from asserting the headaches pre-existed the 2001 injury by the Maine Consent Decree.

[27] I have previously determined that the claim before me covers days missed in 2003, 2004, and 2005 through April 5, 2006. The Amended CX 20 includes 53 days between 2003 and April 5, 2006 for which the Claimant contends he is entitled to compensation benefits.

aggravation that resolved shortly after the incident and consequently the Claimant is not entitled to compensation for any of the days claimed on Amended CX 20. BIW Br. at 16; BIW R. Br. at 4. For the reasons discussed above, I was not persuaded by BIW's arguments on causation.

Alternatively, BIW disputes the Claimant's entitlement to compensation for some of the specific days listed on the Amended CX 20. BIW Br. at 4. Specifically, BIW contends that the Claimant testified that all of the days listed on Amended CX 20 were days for which he received no compensation, but that the exhibit itself demonstrates that he did receive compensation for eighteen of the days claimed. *Id*. As the Claimant is no longer seeking compensation for those eighteen days, having stricken them on the face of Amended CX 20, BIW's argument in this regard is confusing.[28] I note, however, that three of the days the Claimant is still seeking compensation benefits for February 23, 2004, April 29, 2005, and May 2, 2005, he was paid for as he took those days as vacation days. Amended CX 20; CX 2 at 25, 27.[29] For the two days in 2005, the Claimant obtained an authorized absence excuse from Dr. Chassie. CX 8 at 222. However, as the Claimant was paid for these days he has not experienced a loss in pay or earning capacity on those three days. The Employer has not challenged the Claimant's entitlement to compensation for any other specific date claimed. I have determined that the Claimant's current chronic neck pain and headaches resulted from the 1991 and the 2001 aggravation, the Claimant is entitled to compensation benefits for the 49 (52 - 3 = 49) individual days he missed work as a result of his headache condition from 2003 through April 5, 2006 at a rate of 66 2/3 % of his average weekly wage of $764.96.[30]

J. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d

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[28] BIW also contends that two of the days claimed, August 8, 1996 and August 16, 1996, were addressed in the Consent Decree issued on December 6, 1996, and cannot be raised at this time. BIW Br. at 4, 12-13. As I have determined that the present claim covers only the period 2003 through April 5, 2005, the two days in 1996 are not included within the present claim.

[29] For several of the days claimed, the Claimant neither saw a physician nor obtained a medical excuse for his absence, e.g., May 18, 2004, June 1, 2004, July 14, 2004, October 11, 2004, October 19, 2004, October 27, 2004, August 1, 2005, August 9, 2005, August 17, 2005, August 31, 2005, September 13, 2005, October 18, 2005, rather, he simply called in that morning and stated he would be off work for a yard injury. I have significant concern that this procedure of calling in on a frequent basis when a headache occurs without seeing a physician or obtaining a medical excuse is subject to abuse. However, the Employer has not raised this as an issue and appears to have changed the procedure in May 2005. Additionally, Dr. Austin testified that it would be appropriate for the Claimant to be off from work one to two days per month as a result of his condition. Thus, it appears the frequency with which the Claimant has been off from work in 2005 (29 days Amended CX 20, subtracting four days for the slip and fall which I found was unrelated) is not consistent with Dr. Austin's opinion when he signed the FMLA form for the Claimant. It appears that Dr. Chasse simply writes a note excusing the Claimant from work whenever the Claimant requests, even if Dr. Chasse has not seen the Claimant that day or for perhaps several days after the work absence (July 23, 2004; July 27, 2004; December 17, 2004; April 29, 2005; June 16, 2005; July 7, 2005; July 25, 2005; September 19, 2005). Nevertheless, the Employer has not raised an issue with respect to Dr. Chasse's apparent practice.

[30] The Claimant conceded that BIW accommodates his work restrictions and that he is able to work within those restrictions except on days when he experiences debilitating headaches.

933, 937 (2nd Cir. 1976). My Order will grant the Claimant's counsel 30 days from the date this order is issued in which to file a fee petition. My Order will grant the Employer 15 days from the entry of the Claimant's fee petition to file any objection.

K. Conclusion

In sum, I have found that the Claimant's chronic neck pain and intermittent headaches resulted from his 1991 work injury and were aggravated by the 2001 work injury and that he is entitled to compensation under the Act. The Claimant is entitled to permanent partial disability compensation benefits for the 53 days missed from work over the period beginning 2003 through April 5, 2006. I have further determined that the Claimant's past medical care was reasonable and necessary, but that continued manipulation therapy is no longer reasonable and medically necessary.[31]

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, including the parties' stipulations, the following order is entered:

1. The Employer shall pay to the Claimant permanent partial disability compensation benefits for 49 days missed as a consequence of his work injuries pursuant to Section 8(c) of the Act, 33 U.S.C. §908(c)(21), at a rate of 66 2/3 percent of his average weekly wage, based upon an average weekly wage of $764.96;

2. The Employer shall provide reasonable and necessary medical care, including chiropractic manipulation therapy, through March 24, 2005, for the Claimant's work-related chronic neck pain and headache;

3. The Claimant's attorney shall file an itemized fee petition within 30 days of the issuance of this order, and the Employer shall have 15 days thereafter to file any response pursuant to 33 U.S.C. §928(a); and

4. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

[31] Despite explicit instructions in the Briefing Order, neither party submitted a Proposed Order addressing each element of relief sought. Briefing Order June 28, 2006.